IN THE HIGH COURT OF JUDICATURE AT MADRAS.

DATED: 03/07/2002

CORAM

THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR
AND
THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN.

T.C. No.1277 of 1988 and T.C.No. 1278 of 1988.

Shri G.D. Gopal,Coimbatore. ...Applicant
in both T.Cs.

.vs.

The Commissioner of Income-tax,
Coimbatore.
...Respondent
in both T.Cs.

Tax Cases filed under Section 256(1) of Income Tax Act 1961
against the order of the Income Tax Appellate Tribunal, Madras in I.T.A. Nos.
1237 and 1238/Mds/1985.

!For Applicant in
both T.Cs. ..... Mr.P.P.S.Janardhana Raja.

^For Respondent in
both T.Cs. ..... Mr.T.C.A.Ramanujam
Senior Standing Counsel
(Income Tax).

:JUDGMENT

(Judgment of the Court was delivered by
V.S.SIRPURKAR,J).

The common question referred to us in these two T.Cs is as
follows:-

"Whether on the facts and in the circumstances of the case,
the Appellate Tribunal was right in law in holding that the excercise of
powers by the Commissioner of Income Tax under Section 263 of the Income Tax
Act,1961 for the assessment years 1980-81 and 1981-82 was within the period of
limitation?

2.The following factual circumstances would highlight the controversy. It will be seen that Section 263 of the Income Tax provided a limitation of 2 years from the date of the passing of the order for revising that order under that Section. The amendment which was made by Section 47 of the Taxation Laws (Amendment) Act 1984 provides now that the said limitation would stand extended and the limitation of the two years would start not from the date of the passing of the orders but from the last date of the relevant financial year. The amendment is to be found in the following words:
The amended Section 263(2) runs as under:-

"No order shall be made under Sub Section 1 after the expiry of two years from the end of financial year (emphasis supplied) in which the order sought to be revised was passed.The emphasized words would clearly suggest that even if the order which is sought to be revised under the Section is passed earlier, the limitation of 2 years however would start from the end of the relevant financial year and in that sense the limitation would stand extended to that effect".
3.The assessee in these cases had made a voluntary disclosure of Rs.1,00,000/- as representing the income for 1974-75 and earlier years, being the value of some items of steel and paints. While making the assessments for the relevant two years the Income Tax Officer had not included in assessee's total income any portion of the income arisen on sale of some goods. Therefore, the Commissioner of Income Tax after going through the records considering that the action of the Income Tax Officer in not including the sale proceeds of the items of steel and paints was erroneous, sought to use his powers under Section 2 63 by revising the order.
4. When the revision was taken up, it was pleaded before the Commissioner that the action was barred by limitation as the period of two years allowed under the Income Tax Act had already expired. It was pointed out that since the assessments of two years were made on 21.12.1982, the action under Section 263 of the Act could be taken only upto 21.12.1984, whereas the action in this case was taken in March 1985 . The Commissioner negatived these contentions on limitation and held that by virtue of the Taxation Laws Amendment Act 1984, the period of limitation stood extended upto the expiry of two years from the end of financial year in which the assessment order was passed, which order was sought to be revised. He has found on merits against the assessee in his order. But we are not concerned with the merits in these cases as the learned counsel for the assessee has restricted his argument only to the limitation aspect. The matter was taken up before the Tribunal and the Tribunal by its order impugned came to the conclusion that the exercise and the action under Section 263 of the Act ordered by the Commissioner were in order and could not be said to be beyond the limitation. It is only on the basis of this that ultimately the question came to be referred to us.

5.Mr.P.P.S.Janardhana Raja, the learned counsel for the assessee has heavily relied upon a circular No. 402 dated 1.11.1984 issued by the CBDT, which is to the following effect:-

"Income Tax Circulars

Circular No.402, dated November 1,1984.

Subject:- Taxation Laws (Amendment) Act,1984-Amendment of S.263 of the I.T.Act, 1961-Clarification regarding.

As a consequence of the amendment of Section 263 of the Income Tax Act,1961, by Section 47 of the Taxation Laws (Amendment) Act, 1984, the limitation for passing an order under Section 263 will, in view of general principles of interpretation of statutes, stand extended in cases where the period of limitation originally laid down in that section had not expired before 1st October,1984. However, with a view to avoiding controversy and litigation in the matter, it is desirable that orders under Section 263 of the Income Tax Act are passed, as far as possible, within two years of the date of the order sought to be revised in cases where the order sought to be revised was passed before 1st October, 1984.

(Sd.) Kalyan Chand
Under Secretary
Central Board of Direct Taxes.
(F.No.279/146/84-ITJ).

(151 I.T.R.(STATUTES) Page 46)".

The learned counsel very fairly says that since the amendment made to Section 263 is of procedural nature, ordinarily it would be retrospective in nature. The learned counsel however further carries his argument suggesting that because of the circular, which we have quoted above, the concerned authority was bound to exercise his powers within two years from the passing of the order. The learned counsel points out that in the circular the period considered is upto 1.10.1984 in the sense that in respect of those cases where the period of limitation had not expired before 1.10.1984, it would be desirable for the Officers to initiate the action under Section 263 of the Act within two years of the date. The learned counsel, therefore, points out that in present case the concerned orders were passed in December 1982. He, therefore, contends that as per this circular, the action under Section 263 of deciding to revise the orders should have been taken before two years of the passing of the orders and not in consonance with the amendment made, i.e., the action should not have been taken beyond the period of 21st December 1984, which has happened in this case.

6.The learned counsel contends that even when the amendment had come already and even if it is presumed that the amendment is of a retrospective nature yet, because of the circular, it would be incumbent upon the Department to initiate action within two years as per the old unamended law and not as per the amended law. The learned counsel therefore heavily relies on the circular. He says further that the circular has been consistently followed by the Department in the sense that under such cases where the limitation had not expired before 1st October 1984, the Department has been initiating the actions only within two years of the passing of the

orders and not in terms of the amendment of Section 263 of the Act. For this the learned counsel relies heavily on the judgment of this court in T.C.Nos. 680 to 682 of 1998 (Shri N. Mahalingam, Pollachi .vs. The Commissioner of Income Tax, Coimbatore) dated 25.9.2001 - (R.JAYASIMHA BABU AND MRS.A. SUBBULAKSHMY,JJ). It is pointed out that in that judgment there is a statement recorded by the Senior Standing Counsel of the Department. The paragraph is in the following words:-

"The learned Senior Standing Counsel for the Department has informed us that the Department has consistently followed the circular. No reason has been stated as to why that circular was dis-regarded in the instant case. The assessee herein is as much entitled to the benefit of the circular as any other assessee similarly placed. That circular being one which is beneficial to the assessee, is also binding on the Department and the stand taken by the Department inconsistent with the circular cannot be sustained".

7. Mr.P.P.S.Janardhanaraja has also very heavily relied on the judgment of the Supreme Court in "U.CO., BANK .VS. COMMISSIONER OF INCOME TAX" (S.C) (237 INCOME TAX REPORTS 889) suggesting therein that the Departmental circulars, more particularly issued under Section 119 are binding against the Department.

8. As against this, the learned Senior Standing Counsel points out that factually the situation is not correct. He points out that it was not a Departmental practice to ignore the amendment and to take up the action of revision within two years of the orders if the limitation had not expired by 1.10.1984. The learned Senior Standing Counsel has filed an affidavit of one M.L.Kuppusamy, The Commissioner of Income Tax I,Coimbatore. In that affidavit firstly it is suggested that the action initiated in this case more particularly in March 1985 is well within the time in terms of amended Section 263(2) of the Act. It is then asserted that it would not be correct to state that the circular is generally followed by the Departmental Officer. The reason given is that in spite of the best efforts of the Department the cases could arise where the action may not have been possible to be completed within the period of 2 years from the date of assessment order sought to be revised and it is then asserted that in such cases the Department takes recourse to the amended provision of law. It is then submitted that the circular is followed wherever it is so possible to pass the orders by not taking the advantage of the extended period of limitation. But where it is not possible, the recourse has to be taken to the amended provision of law and the extended period of limitation thereunder.

9. The learned Senior Standing Counsel therefore asserts that the order of the Tribunal wherein the action taken under Section 263 has been held to be within time is a correct order and that the reference should be answered against the assessee. The learned Senior Standing Counsel has relied on certain cases and more particularly the decision reported in "COMMISSIONER OF INCOME TAX .VS. MRS.MANJULA SOOD" (22 7 I.T.R.873), " COMMISSIONER OF INCOME TAX .VS. ANJUM M.H. GHASWALA AND OTHERS" (252 I.T.R. 1) and "SHIVA KANT JHA .VS. UNION OF INDIA" (Delhi) (Vol.122 Taxman-Tax Reports 952). We would deal with these cases in the later part of our judgment.

10.First we will have to take into consideration the contention raised by the learned counsel that we are bound by the judgment passed in Mahalingam's case cited supra and that we must adopt the same course. Considering the law of precedents we are unable to accept this

contention. It is trite position in law that the judgment is binding only for the question of law decided by it. There can be no doubt that any judgment of a co-ordinate Bench would be binding on us, but there would be a rider that such judgment must have decided a certain position of law or must have taken a certain view of law. In our opinion the afore mentioned judgment cannot be said to have taken any particular view of law nor can it be said that the judgment decides anything. In the judgment the learned Judges have relied upon a statement made that the circular is normally followed in the sense that the Department initiates the action of revision within one year of passing the order. Relying on that statement the learned Judges have taken a particular course, suggesting that if that was the practice of the Department, then there would be no question of denying the benefits to the assessee. The judgment therefore proceeds on the factual circumstances that statement at the Bar was available to the learned Judges that the circular is normally followed in the sense that in spite of the circular, the Department adheres to the time limit under the unamended provision of Section 263 of the Act. Unfortunately, such factual circumstance is not available to us in view of a clear cut affidavit made on behalf of the Department that it is not in all the cases that the circular is followed in the sense that the action for revision is ordered within two years of the passing of the orders to be revised. Therefore, there is a definite difference on the facts. Again it might have been the practice then to follow the circular but there is nothing on record that it is the practice even now or when the revision was initiated in this case. On the other hand, the practice seems to be otherwise. Therefore,even if a particular course was taken earlier it does not become binding on us. It is again not clear as to what is meant by "following the circular" . If the circular is to be followed then also it cannot divest the revisional authority of his power and further if such power is used, such exercise cannot become illegal.

11.Therefore,we would view the matter from the other angle,i.e., the language of the circular. A plain reading of the circular clearly shows that the Department was aware of the fact that because of the amendment to Section 263(2) the limitation stood extended to the last date of the financial year and that such amendment being in the nature of procedural amendment was applicable to the pending cases also. After asserting that position the circular however cautions or advises the Officers of the Department to initiate the actions as far as possible within two years of the orders where the limitation has not expired on 1.10.1984. The date is extremely significant because the circular itself has come on 1.11.1984. The circular merely states that in such cases where the limitation had not expired the Officers instead of waiting for the extended period, i.e., upto March or as the case may be the last date of the financial year, would avoid the legal controversy and the litigation by initiating the actions within two years of the date of the order. Again the circular mentions very specifically that as far as possible the orders would be passed in terms of the old amended law, i.e., within two years from the date of the passing of the orders for revision. The language of the circular therefore is clear to suggest that this recourse has to be taken where it is possible. It may be that in this case it was not possible for the Commissioner to pass the orders within the time as per the amended Section, i.e., within two years of the passing of the order. In our opinion the circular is extremely clear. Therefore, even if we

accept the statement that the circular was generally followed, there could be the cases where it was not possible for the Officers to follow the circular. When we again go back to the judgment in Mahalingam's case cited supra, the statement made was that the Department has consistently followed the circular. In our view, even if the circular is followed, it was as far as possible because those are the words reflected in the circular itself. There would still be the cases where the circular could not have been followed "as far as possible". This appears to be one such case. Therefore, we are of the opinion that the Tribunal was right in holding that the orders were passed within time. This takes to another task of considering the other argument based on the case law.

12.The learned counsel for the assessee then says that this would mean a differential treatment to the two assessees while one assessee would get the advantage of the circular, the another would be deprived of such advantage. We do not agree with the argument for the simple reason that we are not having the advantage of the facts as to what were the circumstances prevailing for the then learned senior counsel to make a statement that was made by the learned counsel in Mahalingam's case, cited supra. The learned Senior Standing Counsel before us asserts that there is a factual circumstance available before us to the effect that the concerned Officer has sworn an affidavit that wherever it is impossible for them to adhere to the earlier time limit under the unamended law, they take recourse to the extended limitation under the amended provision of Section 263(2) of the Act. In view of that we do not think that this would be the case of any discrimination After all the facts may differ and can differ and in this case they do appear to be different. In this view, we do not want to take any stock of the judgments, which have been referred by the learned counsel for the Departemnt as we find that on the basis of the language of the circular itself, the Tribunal has passed a correct order in law.

13.In that view, we answer the references against the assessee and in favour of the Revenue. No costs.

(V.S.S.,J) (N.V.B.,J)
Index:yes. 3.7.2002.
Website: yes.

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Copy to:

1. The Assistant Registrar,
Income Tax Appellate Tribunal
II Floor, Beasant Nagar,Chennai.

2. The Secretary, Central Board
of Revenue, New Delhi.

3. The Income Tax Officer,
Company Circle V, Coimbatore.

4. The Commissioner of Income Tax
Coimbatore.

V.S.SIRPURKAR,J
and
N.V.BALASUBRAMANIAN,J

T.C.Nos.1277 & 1278 of 1988